IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 101.

JAMES DUIGNAN,

Appellant,

vs.

UNITED STATES OF AMERICA and PALL MALL REALTY CORPORATION,

Appellees.

ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITION FOR WRIT OF CERTIORARI TO THAT COURT.

BRIEF FOR APPELLEE PALL MALL REALTY CORPORATION.

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Pall Mall Realty Corporation.

TABLE OF CONTENTS.

Table of Cases Cited.

Table of Statutes Cited.

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Opinions Below.

This is an appeal from a decree of the Circuit Court of Appeals for the Second Circuit entered February 9, 1925, (R., 152) pursuant to an opinion rendered February 2, 1925, (R., 150), reported 4 Fed. (2d) 983.

The case came to the Circuit Court of Appeals on an appeal from the decree of Judge Knox of the Southern District of New York entered March 28, 1924, (R., 2) pursuant to an opinion rendered March 20, 1924 (R., 137) not officially reported.

Jurisdiction of this Court.

This appeal was taken under the provisions of former Section 241 of the Judicial Code, 26 Stat. 828, providing for a right of appeal to this Court from a Circuit Court of Appeals in any case in which the decree of the latter Court is not made final, and where the matter in controversy exceeds $1,000. Inasmuch as the decree appealed from was entered February 9, 1925, the right to review was not affected by the Act approved February 13, 1925, repealing Section 241, Section 14 of which provided that that Act should not affect the right to a review of any judgment or decree entered prior to the effective date of the Act, which was May 13, 1925. 43 Stat. 942.

The suit was brought by the United States against the appellant to abate a nuisance under Section 2 of Title II, of the National Prohibition Act, 41 Stat. 314, (R., 4). By an amended bill of complaint, the appellee, Pall Mall Realty Corporation, lessor of the premises, was made a defendant (R., 7). The Corporation answered admitting the allegations of the complaint relating to the nuisance alleged, and by way of cross-bill against the appellant, asked for a decree under Section 23 of Title II of the National Prohibition Act, 41 Stat. 314, cancelling the lease and declaring the same to be forfeited (R., 9). The District Court enjoined the appellant, padlocked the premises and granted the affirmative relief sought by the Corporation (R., 2). The Circuit Court of Appeals affirmed this decree (R., 152). It thus appears that the case was not one coming within the provisions of Section 128 of the Judicial Code as they read prior to the Act of February 13, 1925, making the decrees of Circuit Courts of Appeals final in cases in which the jurisdiction was based upon diversity of citizenship, and in cases arising under the patent laws, copyright laws, revenue laws, criminal laws, and in admiralty. 26 Stat. 828.

A petition for a Writ of Certiorari was filed by the appellant herein, No. 1163, October Term, 1924. On June 1, 1925, this Court postponed consideration of the petition until the hearing of the case on appeal.

The appellee does not question the right to appeal, and therefore respectfully suggests that the petition for Certiorari be denied.

Statement of the Case.

The statement of the case in the appellant's brief, page 4, relates the facts giving rise to the suit, but does not accurately describe the decision of the Circuit Court of Appeals, from which this appeal is taken.

The appellant relies for his right to attack the constitutionality of the forfeiture provision of Section 23 upon his general objection to the introduction of evidence in support of the Realty Corporation's affirmative case (R., 81); upon a motion for a jury trial made at the outset of the Government's case (R., 12); and upon a motion to dismiss the cross-bill made at the conclusion of the testimony on the ground that Section 23 is unconstitutional and that the proceeding was "properly triable before a jury" (R., 133). These motions were denied and exceptions noted.

The Circuit Court of Appeals found difficulty in determining just what the appellant meant by his motion for a jury trial, but held that if it was directed to the case raised by the cross-bill as a challenge to the jurisdiction of equity, the appellant was not in a position to make the motion because of his failure to answer that cross-bill or otherwise to raise an issue with the Realty Corporation. The Court held that by his failure to plead, the issue of a want of jurisdiction in equity by reason of an adequate remedy at law, was not before it. The Court did not discuss the constitutionality of Section 23.

The appellant's argument is confined to the issue of the constitutionality of Section 23 and the proceedings there-

under. Nevertheless, the specification of assigned errors includes objections to the Decree awarded the Government, closing the premises, upon the ground that the evidence failed to show a nuisance within the meaning of the statute (p. 9).

In reciting the facts relating to the cancellation of the lease, it is stated on page 5 of the brief that the testimony showed without contradiction that the premises had an annual rental value of $39,000 a year, the inference being that it was highly inequitable to cancel a lease calling for a rental of $14,000 per year, which had until April 30, 1936, to run. However, in answer to questions put by the Trial Judge, the witness who had testified to the $39,000 figure, stated that unless the premises were altered he did not suppose they had any rental value, and in answer to another question put by the Trial Judge he ventured to appraise the hotel value at about $16,500. a year (R., 96).

Questions Involved and Summary of Argument.

The question in this case so far as appellee, Pall Mall Realty Corporation, is concerned, is whether a lessor, named as a defendant in a suit in equity to abate a nuisance under the National Prohibition Act, may be granted a decree in response to his cross-bill, cancelling the lease under Section 23 of the National Prohibition Act (41 Stat. 314).

The appellant contends that such relief is not authorized by this Statute; that a District Court of the United States has no jurisdiction to grant such relief; that if the Statute so authorizes, it is unconstitutional; that in any event the lessee is entitled to a jury trial upon the issues raised by the cross-bill, because that cross-bill sought relief in the nature of ejectment.

The appellee Realty Corporation contends that such relief is germane to the proceeding and is therefore entirely appropriate; that equity in such a case has full jurisdiction to grant

relief to all parties; that the Statute so permits and it is constitutional; that cancellation has long been a recognized head of equity jurisdiction and therefore that the refusal to grant a jury trial was entirely proper; that appellant by failing to answer the cross-bill and to challenge the jurisdiction of equity on the ground of an adequate legal remedy, tendered no issue of want of jurisdiction in Equity, and hence cannot demand a jury trial on that theory or make the point here.

POINT I.

Section 23 of the National Prohibition Act, 41 Stat. 314, gives a Lessor the right to cancel the lease of the premises upon which a violation of the Act by the lessee or occupant has occurred.

The language of the section reads:

> "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease." (41 Stat. 314.)

In the present case, the District Court found a violation of the Statute, enjoined the appellant lessee from any further violations, ordered that the premises be not occupied or used for six months, and directed the appropriate Federal Officers forthwith to lock and seal all the entrances and exits so as effectually to prevent use or occupancy for any purpose whatsoever for a period of six months (R., 2).

Such finding and decree clearly import a material violation of the Statute. The Circuit Court of Appeals quite properly held that the evidence in support of this conclusion was adequate. *Wiggins* v. *United States*, 272 Fed. 41; *United States* v. *Reisenweber*, 288 Fed. 520.

No question is raised as to the materiality of the violation nor is any doubt suggested that the words "any violation" cover the nuisance found to exist herein and enjoined.

The Court is not called upon therefore to construe the words "any violation" as it was in *United States* v. *Zerbey and National Surety Company*, 271 U. S. 332. Indeed, the brief for the appellant does not challenge the finding that a violation occurred.

No further discussion is necessary to establish the unmistakable right of the lessor at his option to declare a forfeiture of the lease under Section 23. The words of the statute are clear.

POINT II.

The right of cancellation may be enforced without trial by jury through an equity decree responding to a cross-bill by a defendant lessor in a suit to abate a nuisance brought by the United States under Section 22 of the National Prohibition Act.

The instant proceeding was brought by the United States under Section 22 of the National Prohibition Act (41 Stat. 314) to abate a nuisance defined in the statute. Section 22 expressly provides:

> "Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

There can be no doubt under this section of the jurisdiction of a District Court of the United States sitting in equity. *Murphy* v. *United States*, No. 443, October Term, 1926, decided December 6, 1926.

The defendants named in the proceeding were the tenant, appellant here, and the lessor, appellee Realty Corporation. The Realty Corporation filed a cross-bill setting up its lease, denying that it suffered the premises to be occupied or used in violation of the National Prohibition Act, and averring

its prompt election upon being apprized that intoxicating liquors were being sold upon the premises, to cancel the lease pursuant to its rights under Section 23 of the Act (R., 9). It prayed that a decree be entered cancelling the lease and directing the ouster of the tenant and repossession by the lessor (R., 11). The relief sought by this cross-bill was entirely germane to the main proceeding, and therefore properly was granted. Upon this ground in four cases involving identical situations, lower Federal Courts have entertained such cross-bills and have decreed the relief therein sought.

In *Grossman* v. *The United States*, 280 Fed. 683 (7th C. C. A., 1922), the United States brought a proceeding to abate a nuisance under the National Prohibition Act against a tenant and his landlord. The landlord by cross-complaint sought a decree cancelling the lease which was granted upon a finding that the nuisance existed. Upon appeal this decree was sustained by the Circuit Court of Appeals, the Court saying at page 686:

> "We have, then, under consideration a cross-bill where the subject-matter is germane to that of the original bill. The relief sought was expressly provided for by the statute. Irrespective of the provisions of the National Prohibition Act, a landlord leasing premises for lawful purposes would be entitled to a termination of the lease, in case the tenant violated the law and maintained a nuisance upon the premises. The defendant Grossman was not deceived by the pleading, for he answered the cross-complaint as well as the original complaint fully, and denied the misconduct with which he was charged.
>
> We conclude that the allegations in the cross-complaint were sufficient to support the decree; that it constituted an election to terminate the lease because of the tenant's violations of the law; that it was a relief which the court was permitted to grant in a suit of this character."

Likewise in *United States* v. *Boynton*, 297 Fed. 261 (E. D. Mich., 1924), the United States filed a bill to enjoin a nuis-

ance under the National Prohibition Act against the tenant, other holders of leasehold interests in the premises, and the holders of the record title. A party claiming in right of certain leases and by operation of law to have become the landlord of the premises was permitted to intervene and file a petition in the nature of an answer and cross-complaint, asserting its claim as landlord, its election to forfeit the lease, and its prayer that the Court declare cancellation and that the intervenor be placed in immediate possession. The Court decided that the intervention was proper upon the ground that the intervenor had a clear interest in the subject of the suit, and that the affirmative relief sought in the cross-bill was entirely appropriate to the issues raised in the main proceeding. The Court indicated that the relief prayed by the intervenor should not be granted until all the evidence respecting the nuisance had been presented, but if this evidence resulted in a finding that a nuisance existed, the Court held that it had full jurisdiction to decree the relief sought by the landlord. The Court said at page 268:

> "It is settled equity practice to permit a defendant in a suit to seek relief against another defendant in such suit with respect to a matter germane to the subject thereof. The practice is recognized in general equity rule 30, providing that:
>
> 'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit.'
>
> In the present case the very facts relied on by the plaintiff in support of the decree sought by it might also entitle the intervenors to the relief prayed by them. The situation renders the right to set up the cross-complaint in question peculiarly applicable and appropriate."

In the Second Circuit, *United States* v. *Archibald*, 4 Fed. (2d) 587, decided by Judge Augustus N. Hand in the District Court for the Southern District of New York, and *United States* v. *Gaffney*, 10 Fed. (2d) 694, decided by the

Circuit Court of Appeals, held that the landlord was entitled to cancellation in response to his cross bill.

In line with these decisions and pursuant to settled equity practice, the District Judge entertained the cross-bill in the present case and held that he had jurisdiction to decree the relief sought therein. This was clearly proper. The relief sought by the landlord was germane to the nuisance proceeding. Its adjudication did not require the expansion of the issues raised by the bill. As Judge Hand said in *United States* v. *Archibald*, 4 Fed. (2nd) 587, 588:

> "The landlord is brought into a suit affecting his premises, and for the purpose of closing them up. If he can get no relief of a speedy nature in the action itself, he will be put in a position where the decree closing the premises impairs the earning capacity of his tenant, and leaves him with a lease which he cannot get rid of in the court in which the suit is brought. It seems to me that the rights invoked by the government, the rights of the tenant, and the rights of the landlord, and the relief sought for or against these parties, are matters germane to the suit brought, and such rights were properly so described by the Circuit Court of Appeals of the Seventh Circuit. U. S. v. Grossman, 280 Fed., at page 686."

Moreover, it is not only appropriate but settled equity practice for the Court to do full justice between all the parties properly before it.

> *Dewing* v. *Perdicaries*, 96 U. S. 193, 197;
> *Gormley* v. *Clark*, 134 U. S. 338, 349;
> *United States* v. *Union Pacific Ry.*, 160 U. S. 1, 52;
> *Chanslor-Canfield Oil Co.* v. *United States*, 266 Fed. 145 (Ninth C. C. A.);

The landlord as a party to the proceeding was entitled to have any of its rights, relevant to the issues raised therein, finally settled.

Furthermore, cancellation of a lease of this character is a familiar head of equity jurisdiction and therefore it was entirely proper for the District Court to enter its decree in favor of the landlord. *United States* v. *Union Pacific Ry.*, 160 U. S. 1, 52; *Louisville, etc. Ry. Co.* v. *Louisville Trust Company*, 174 U. S. 552, 567.

These familiar powers of a court of equity are not diminished by the absence in Section 23 of express language describing the proceeding by which the forfeiture was to be enforced. Congress left open the method of enforcement and landlords are entitled to assert their rights under the statute in any proceeding which they may elect and which is appropriate. The elimination in the statute of any definition of the proceeding, such as occurs in the Iowa statute, which the appellant asserts was the pattern for Section 23, indicates a Congressional purpose not to follow that statute in confining the remedy to an action at law.

Jurisdiction in Equity Was Not Ousted by the Fact That Similar Relief Might Have Been Sought in an Action at Law.

Nor will the fact that the relief sought by way of cross-bill might also be obtained in an action at law, oust a court of equity of its jurisdiction to decree that relief. It is assumed for purposes of this argument that the defendant tenant is in a position to set up here the existence of a remedy at law to defeat the jurisdiction in equity. It is to be noted, however, that he failed to raise this issue by any pleading and it will be argued subsequently that this failure on his part bars him from objecting now to equity jurisdiction upon this ground (*Infra*, p. 26).

The adjudication of the issue raised by the cross-bill was precisely within the language of Mr. Justice Pitney, in *McGowan* v. *Parish*, 237 U. S. 285, 296.

> "The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But 'a court of equity ought to do justice completely, and not by halves;' and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp* v. *Boyd*, 229 U. S. 530, 551-552, and cases cited."

In the present case the relief sought by the landlord is clearly "bound up with questions appropriate for decision by an equitable tribunal"—i.e., the issuance of an injunction against a nuisance. The length and scope of the injunction directing the padlocking of the premises was of immediate concern to the landlord and his endeavor to cancel the lease under Section 23, bore directly on the effect of that injunction. In the discretion of the court, upon the filing of sufficient bond, a tenant may be repossessed of the premises and the injunction run only personally against him. See *Murphy* v. *United States*, No. 443, October Term, 1926, decided December 6, 1926. Clearly the landlord had a vigorous interest in the controversy and his prayer for relief was directed to preserving his interest therein. Therefore, it was entirely proper that equity take cognizance of the issues raised by the cross-bill and settle the entire proceeding. The fact that those issues might have been raised in an action at law does not oust equity's jurisdiction. In *Camp* v. *Boyd*, 229 U. S. 530, 552, Mr. Justice Pitney said:

> "One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *Holland* v. *Challen*,

110 U. S. 15; *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Gormley* v. *Clark*, 134 U. S. 338, 349."

See, also,

Osborne & Co. v. *Barge*, 30 Fed. 805, 806 (C. C., N. D. Iowa 1887).

The Relief Sought by the Cross-Bill Was Appropriately Granted by a Court of Equity.

Manifestly the granting of the relief sought by the landlord worked no forfeiture which a court of equity might hesitate to effect. The statute in unmistakable words gives to the landlord the right to cancel at his option. When a court of equity enforces that right no inequitable forfeiture results.

It is well settled that forfeitures imposed by statute for violations of law are of the character of public penalties and courts are not at liberty to modify their incidence.

Maryland v. *Baltimore & Ohio Railroad Co.*, 3 How. 534, 552;
Clark v. *Barnard*, 108 U. S. 436, 457;
Powell v. *Redfield*, 4 Blatchford, 45.

Moreover, the lease here in question carried an express provision in its 23rd Article (R., 144) in which the tenant covenanted and agreed "to comply in all respects with the provisions of all present and future laws relating to the traffic in or sale of liquors, and the taxation and the regulation of the same, or the regulation of the use and occupation of the demised premises." Upon a violation of this covenant the landlord would have been entitled to prosecute ouster proceedings under the laws of the State of New York. Civil Practice Act, Sections 990 *et seq.*; 1410 *et seq.* There is nothing either harsh or inequitable in visiting the appellant's violation of this express covenant with the consequences announced by the Federal Statute.

The language of District Judge Knox fairly describes the appellant's position. "Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless he chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease" (R., 138).

The traditional reluctance of an equity court to lend its assistance in enforcing a forfeiture may not be invoked to deny the relief accorded the appellee in the present case. Where the right is clear, and the aid of equity is invoked in the public interest, the fact that a forfeiture is being decreed is no reason to withhold relief.

In *Kern River Co.* v. *United States*, 257 U. S. 147, the United States sought by a bill in equity to cancel grants covering the right-of-way for a canal, upon the ground that the land was being used for developing electric power instead of for irrigation purposes, and that an implied provision of the grant gave the United States the right to forfeit for this misuse of the property. It was contended that equity should not enforce the forfeiture. Replying to this contention, Mr. Justice Van Devanter, said at page 155:

> "The appellants invoke the rule that a court of equity usually is reluctant to lend its aid to enforcing a forfeiture. But where, as here, the right to the forfeiture is clear and is asserted in the public interest, equitable relief, if otherwise appropriate, is not withheld. *Farnsworth* v. *Minnesota & Pacific R. R. Co.*, 92 U. S. 49, 68; *Union Land and Stock Co.* v. *United States*, 257 Fed. 635."

So here, equitable relief, clearly appropriate, and asserted in the public interest, will not be withheld upon the ground that a forfeiture is being imposed.

POINT III.

Section 23 of the National Prohibition Act is not unconstitutional when construed as authorizing the relief granted herein.

It is contended that Section 23, if construed to authorize the relief sought in the present case, is unconstitutional, upon the ground that the Eighteenth Amendment confers no power upon Congress to authorize such relief, and that the section so construed violates the guaranty of a jury trial in civil cases assured by the Seventh Amendment.

These contentions, if open at all to the appellant, rest wholly on a motion made at the close of the case to dismiss the cross-bill on the ground that Section 23 "is unconstitutional" (R., 133). There was no pleading by the appellant to support this motion. The argument submitted *infra* under Point IV establishes that these contentions are not open to the appellant. The Circuit Court of Appeals did not consider them. Since the decision appealed from, however, the Circuit Court of Appeals for the Second Circuit has considered and sustained the constitutionality of Section 23, in *United States* v. *Gaffney*, 10 Fed. (2d) 694.

The Cancellation of the Lease Is An Appropriate Means of Enforcing the Eighteenth Amendment.

The Eighteenth Amendment provides in Section 2:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The constitutional inquiry is whether the statute in question may be said reasonably to carry out by appropriate means the power conferred upon Congress by the Constitution. In deciding whether the cancellation of a lease

covering premises upon which a violation of the statute has occurred is a means reasonably appropriate to carry out the prohibitions of Section 1 of the Amendment, every presumption will be made in favor of validity of the statute.

In the *National Prohibition Cases*, 253 U. S., 350, 387, it was held that Section 2 of the Eighteenth Amendment empowers Congress to enforce the prohibitions of the amendment "by appropriate means". In the concurring opinion of Mr. Chief Justice White, at page 392, he outlined his views as to the effect of Section 2 in the following language:

> "Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do."

Ever since the decision in *Mugler* v. *Kansas*, 123 U. S. 623, there can be no doubt that abatement by injunction of a nuisance of the character described in the National Prohibition Act, is an appropriate and effective means to carry out constitutional prohibitions.

Murphy v. *United States*, No. 413, October Term, 1926, decided December 6, 1926, is the latest decision of this Court sustaining the abatement of a nuisance by injunction.

The forfeiture of a lease is a means no less appropriate to carry out the prohibitions of the first section than the authorizing of a court of equity by perpetual injunction to abate a nuisance. Especially is that true where as here the identical facts sufficient to support the injunction will support the landlord's right to declare a forfeiture.

The "padlock" injunction, so-called, may and frequently does deprive the tenant of all use or enjoyment of the premises during its continuance. Where the duration of the injunction and the life of the lease are co-extensive, mani-

festly the tenant suffers no double loss if his lease is declared forfeit at the same time. In such a case one method of enforcement is the exact equivalent of the other. If the lease by its terms outlives the injunction, the tenant may—or may not—suffer a further loss of property, but it is one imposed upon him by way of penalty designed to render a renewed violation impossible at the spot and by its deterrent effect improbable elsewhere.

The decisions in the lower Federal courts in which the question has been raised are as above stated unanimously in favor of the validity of Section 23. *Grossman* v. *United States*, 280 U. S. Fed. 682 (7th C. C. A.); *United States* v. *Boynton*, 297 Fed. 261 (E. D. Michigan); *United States* v. *Archibald*, 4 Fed. (2d) 587 (S. D. N. Y.); *United States* v. *Gaffney*, 10 Fed. (2d) 694 (2nd C. C. A.).

United States v. *Lot 29* etc., City of Omaha, 296 Fed. 729, (D. Nebraska) is not to the contrary. There was no dispute between landlord and tenant in that case.

In passing on the constitutionality of Section 23 in *United States* v. *Gaffney*, 10 Fed. (2d) 694, 696, Judge Hough said:

> "In considering jurisdiction over this particular kind of statutory nuisance, it is well to remember * * * that jurisdiction in equity to restrain and abate nuisance is much older than the Volstead Act; that the right of any tenant to retain possession of the leased premises depends upon his observance of the covenants in the lease, both express and implied; and that every lease contains an implied obligation that the lessee shall use the property legally and for lawful purposes. * * * When that covenant was broken by the tenant, all right to maintain the lease as against the landlord was gone; and it was assuredly within the power of the nation to aid the landlord to recover his premises, by a method well known to the law, and not created by the amendment."

Forfeiture of Property Has Long Been a Recognized Method of Compelling Obedience to Prohibitory Legislation.

Since the earliest acts of Congress, it has been a constant policy to insure the enforcement of prohibitory legislation by prescribing forfeitures of goods or property involved in the violation. The number of such instances is legion, and a few of them are set forth below to illustrate the long established practice which is further evidence of the reasonableness of the means adopted in Section 23 for visiting a penalty upon a violator of the law.

In the Act approved October 20, 1914, c. 330, 38 Stat. 741, providing for the leasing of coal lands in Alaska by the Secretary of the Interior, Section 14 provided that any such lease might be "forfeited and cancelled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this Act." (38 Stat. 745).

Revised Statutes, Section 3405, being the Act approved June 30, 1864, 13 Stat. 263, provided that any person who purchases or receives for sale any cigars, from any manufacturer who has not paid a special tax provided in such cases should be liable to a penalty of $100, "and to a forfeiture of all the said articles so purchased or received, or of the full value thereof."

Copyrighted books introduced into this country in violation of the Copyright Laws are subject to forfeiture under the Act of March 4, 1909, c. 320, Section 32, 35 Stat. 1083, providing that such books "shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the Customs Revenues Laws." This section was sustained in an opinion of the Attorney General reported in 22 *Op. Attorney General* 29, 70 (1898).

The legislation relating to the forfeiture of vessels engaged in smuggling, or entering American ports without complying with the proper registry requirements is voluminous, and goes back at least as far as the Act of March 2, 1799.

Thus Revised Statutes, Section 3095, being Section 92 of the Act of March 2, 1799, c. 22, 1 Stat. 697, provided that no merchandise of foreign manufacture subject to the payment of duties should be brought into the United States from any foreign port in any other manner than prescribed by the statute:

> "Under the penalty of seizure and forfeiture of all such vessels and of the merchandise imported therein."

Section 69 of this early statute, 1 Stat. 678, provided for the forfeiture of any merchandise imported or brought into the United States through concealment, and it has been held that goods are forfeitable under this section, although the United States were not in fact defrauded and although there was no intent to defraud. *United States* v. *Fifty Waltham Watch Movements*, 139 Fed. 291, 298 (N. D. N. Y., 1905).

Section 37 of this same statute, 1 Stat. 658, provided for the forfeiture of spirits and wines landed without inspection in this country.

In order to make effective the enforcement of the laws relating to oleomargarine, the Act of August 2, 1882, provided in its 17th Section, c. 840, 24 Stat. 212, for the forfeiture of the factory and the manufacturing apparatus used by any one engaged in carrying on the business of manufacturing oleomargarine, who defrauds or attempts to defraud the United States.

Similarly with respect to the opium trade, Section 5 of the Act of January 17, 1914, c. 10, 38 Stat. 278, provided that any opium prepared for smoking wherever found within the United States without the stamps required by Act of Congress "shall be forfeited and destroyed."

The laws relating to the registry of private yachts provided in Revised Statutes, Section 4214, as finally amended by the Act of August 20, 1912, c. 307, 37 Stat. 315, that vessels not properly licensed under the statutes relating thereto shall "be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this title."

The Act of August 3, 1894, c. 198, 28 Stat. 222, authorizing the granting of leases for property in Yellowstone National Park, provided that the lessees must observe and obey all provisions in any act of Congress and every rule, order or regulation published by the Secretary of the Interior concerning the management of the Park "under penalty of forfeiture of such lease."

In that same connection the statutes relating to the Government of the National Parks have uniformly provided for the forfeiture of guns, traps, and other apparatus used in illegal hunting in the National Parks. Section 5 of the Act of August 22, 1914, c. 264, 38 Stat. 701, applying to Glacier National Park is illustrative of these provisions.

The Anti-Trust provisions of the Wilson Tariff Act, of August 27, 1894, c. 349, 28 Stat. 570, provided in Section 76, that any property owned by any combination or pursuant to any conspiracy described in Section 73 of that statute, which was imported into the United States or was in the course of transportation from one State to another should be forfeited to the United States, "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law."

Peculiarly appropriate to the issue raised by the present case is the host of forfeiture provisions to be found throughout the Internal Revenue Laws relating to liquor. Thus the Act of July 20, 1868, c. 186, 15 Stat. 126, required the forfeiture of every still or distilling apparatus not registered in accordance with the statutory requirements, to-

gether with all personal property in the possession or custody or under the control of the person possessing the offending still, which was to be found in the building or in any yard or enclosure connected with the building in which the still was situated.

Similar provisions calling for the forfeiture of liquor or of apparatus used in its manufacture may be found in Revised Statutes, Section 3279, 15 Stat. 132; Revised Statutes Section 3281, 15 Stat. 142; Revised Statutes Section 3289, 15 Stat. 150; Act of March 3, 1877, c. 114, 19 Stat. 395; Revised Statutes, Section 3225, 15 Stat. 142; and Revised Statutes, Section 3153, 13 Stat. 240.

The forfeiture of vessels engaged in transporting timber cut in violation of law upon the public lands of the United States was provided for in the Act of March 2, 1831, c. 66, 4 Stat. 472, and this statute was expressly upheld in *United States* v. *Helena*, Fed. Cases 15, 342.

A vessel entering the harbor of the United States from any foreign territory adjacent to the northern frontier of the United States and whose master fails to report at the Office of the Collector of Customs nearest to the point of entry is forfeitable under Revised Statutes, Section 3109, 14 Stat. 188.

These Statutes are but illustrative of a great many forfeiture provisions imposed by Congress, to insure the enforcement of regulatory or prohibitory legislation. As long as the judicial safeguards of due process of law surround the enforcement of these forfeiture provisions their validity has never been questioned. They amply establish the reasonableness of the selection by Congress in Section 23 of the National Prohibition Act of the cancellation of the tenant's lease as a penalty for his violation of the Prohibition Law.

As far back as *United States* v. *Grundy*, 3 Cranch, 337, Chief Justice Marshall held, construing the Act of December 31, 1792, that the Legislature properly could pass a statute authorizing the forfeiture of a vessel guilty of a violation of

the Revenue Laws, and that such statute might make the commission of the Act immediately operative as a forfeiture of the property to the United States (at p. 352).

The recent decision of this Court in *Goldsmith-Grant Co. v. United States*, 254 U. S. 505 (1921), in which the forfeiture of an automobile used in transporting liquor in violation of the Act of July 13, 1866, c. 184, 14 Stat. 98, 151, was sustained, again reaffirmed the power of Congress to enforce by forfeiture prohibitory legislation. Reviewing a great many decisions sustaining forfeiture statutes, this Court held that this was a reasonable means appropriate to carry out the power of Congress and that there was no denial of due process even if the ultimate sufferer had not been party to the violation. See also *United States v. One Ford Coupe Automobile*, No. 115, October Term, 1926, decided November 22, 1926. Manifestly in the present case where the appellant, the violator, is to be the ultimate sufferer by reason of the forfeiture, no violation of due process occurs when his lease is cancelled by a court of equity.

The fact that in most cases of forfeiture imposed by Act of Congress, the property forfeited enures to the benefit of the United States, while here, the cancellation of the lease causes the property to revert to the landlord presents no constitutional objection. The purpose of the statute is to deter violations of the law. The forfeiture here imposed clearly is of a penal character and in imposing it for its deterrent effect, the law is indifferent to the possible benefit to the claimant of the forfeited property.

An analogous situation was presented in *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, in which a law of Missouri, allowing double damages to parties who had suffered injury through the loss of livestock due to the failure of Railroad Companies to erect fences as required by State Law, was challenged as repugnant to the due process clause of the 14th Amendment. The statute was sustained upon the theory that it lay within the police power of the State

to require the erection of these fences, and to insure their erection by imposing upon violators a penal liability in addition to the actual damage resulting from the wrong. The fact that the fruits of this penalty enured to the sufferer rather than to the State was held to be no objection to the laying of the penalty. Mr. Justice Field said at page 522:

> "The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. That is a matter on which the company has nothing to say. And there can be no rational ground for contending that the statute deprives it of property without due process of law. The statute only fixes the amount of the penalty in damages proportionate to the injury inflicted. In actions for the injury the company is afforded every facility for presenting its defence. The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

So here, the fact that the fruits of the imposition of the penalty do not come to the United States but go to the landlord is no objection to the reasonableness of the means to which Congress has resorted to make effective its prohibitions. It is a matter wholly for legislative discretion.

A further analogy is presented by the provisions of Revised Statutes, Section 3213, being the Act of July 13, 1866, C. 184, 14 Stat. 110. This section provides:

> "All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any District Court of the United States for the District within which said fine, penalty or forfeiture may have been incurred * * *."

This section expressly authorizes a *qui tam* proceeding in which, of course, the informer would be entitled to a share in the fruits of the forfeiture visited upon the violator. No constitutional objection has ever been asserted to this form of proceeding upon the ground that the United States does not obtain all the fruits of the forfeiture. Indeed as early as *United States v. Simms*, 1 Cranch 252, Chief Justice Marshall held that a proceeding *qui tam* was appropriate under existing legislation in Virginia for enforcing the forfeiture of apparatus used for gambling purposes, the forfeiture to be recovered by any person who might sue for the same.

The Cancellation of the Lease under Section 23 Did Not Expand the Common-Law Rights of the Landlord.

As stated in the appellant's brief (p. 28), the landlord had a right under the laws of New York to repossess the premises in case of illegal use, and to prosecute either an action in ejectment or a summary proceeding to that end. Civil Practice Act, Sections 990 *et seq.*; 1410 *et seq.* This right rested not only on the express covenant of the lease but upon the implied covenant to obey the law. *United States v. Gaffney*, 10 Fed. (2d) 694, 696. The attack against the constitutionality of Section 23 becomes therefore a mere attack upon a familiar remedy and not upon the right, which the Statute does not enlarge.

The Cancellation of the Lease by a Court of Equity Does Not Violate the Seventh Amendment.

It follows that the section was within the power granted by the Eighteenth Amendment, and the only further inquiry is whether the section contravenes other provisions of the Constitution. The appellant asserts that the Seventh Amendment requiring that the right to jury trial be preserved

"in civil cases" makes Section 23 invalid if it be construed as authorizing a court of equity to cancel a lease. The first and obvious answer to this contention is that the words "in civil cases" appearing in the Seventh Amendment are used in contra-distinction to equity and admiralty jurisprudence. This was pointed out by Mr. Justice Story as far back as *Parsons* v. *Bedford*, 3 Peters, 433, 436.

And it is well settled that an equity court having jurisdiction of a suit in equity properly initiated before it, may be authorized by statute or may proceed without statutory authorization to determine all issues before it, although many of the questions raised would ordinarily be triable purely as cases at law. A statute so authorizing does not contravene the Seventh Amendment.

Barton v. *Barbour*, 104 U. S. 126, 133, 134:

> "The argument is much pressed, that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or the receiver, will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right.
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> But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.
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> * * * * * * * *
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> So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases of law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of

equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

In the present case the proceeding was appropriately brought as a suit in equity in view of the plain language of Section 22, and of the ancient character of a suit in equity to abate a nuisance. It was therefore entirely appropriate for equity to take jurisdiction of the question raised by the demand for forfeiture of the lease, even if that question were one which might also have been litigated in an action of ejectment. However, as pointed out previously in this brief, a bill to cancel a lease is a familiar type of equity jurisdiction and therefore the cross-bill did not raise an issue involving purely a question of law. The case is like *Luria* v. *United States*, 231 U. S. 9, 27, in which the United States sought to cancel a naturalization certificate upon the ground that it had been obtained by fraud. The contention was urged that an equity proceeding to cancel the certificate amounted to a denial of the defendant's right to a trial by jury. To this Mr. Justice Van Devanter said:

> "Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The claim is predicated upon the Seventh Amendment to the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests made it a suit in equity. *Parsons* v. *Bedford*, 3 Pet. 433, 447; *Irvine* v. *Marshall*, 20 How. 558, 565; *Root* v. *Railway Company*, 105 U. S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See *United States* v. *Stone*, 2 Wall. 525; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Bell Telephone Co.*, 128 U. S. 315."

The Writ of Assistance included in the decree of the District Court directing the marshall to remove the tenant from the premises and to deliver possession to the landlord did not exceed the boundaries of equity jurisdiction (R., 3). It was entirely appropriate after entering a decree cancelling the lease to issue an order making that decree promptly effective. That was all the Writ of Assistance did, and the fact that some similar relief could have been obtained by an action of ejectment or a dispossess proceeding under a New York Statute, is wholly immaterial.

The foregoing argument it is respectfully submitted, answers the contentions of the appellant that Congress lacks power to interfere with State laws relating to land tenure, leases, etc. The contention would be sound were it not for the fact that here Congress was dealing with a subject over which it had plenary authority in view of the prohibitions of the Eighteenth Amendment which it was empowered specifically to enforce. Its powers thereunder clearly override local land tenure regulation. Specific powers conferred by the federal Constitution are not to be cut down by the residuum of local power retained by the States under the Tenth Amendment.

POINT IV.

The failure of the appellant to answer the cross-bill bars him from asserting a lack of equity jurisdiction upon the ground of adequate remedy at law.

The Circuit Court of Appeals properly held that the defense of lack of equity jurisdiction on the ground of adequate remedy at law was not available to the appellant because he had failed to tender such issue by any pleading on his part. He made no answer to the cross-bill at the opening of the case, but made a motion for a jury trial (R., 12) which was

denied (R., 29). Obviously this was a motion addressed solely to the discretion of the court, asking, as indeed it states, that certain issues be framed for trial by jury. In this there was no challenge of equity jurisdiction. At the close of the case (R., 133) the appellant made a motion to dismiss the proceeding upon the ground among others:

> "That this proceeding is properly triable before a jury."

This motion was not open to him at that time if it be construed as a challenge to equity jurisdiction upon the ground of adequate remedy at law, because there had been a complete failure to plead this defense. No mention was made of any reason for the motion and no suggestion was advanced until the case reached the Circuit Court of Appeals that equity lacked jurisdiction on this ground.

The appellant tried the case fully without an answer. He thereby entirely barred himself from subsequently objecting in the appellate court to equity jurisdiction. As this court said in *Wylie* v. *Coxe*, 15 How. 415, 420:

> "The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the Appellate Court, unless the want of jurisdiction is apparent on the face of the bill."

In *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 80, 81, this Court said on the same subject:

> "Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings."

In *Reynes* v. *Dumont*, 130 U. S. 354, 395, this Court said:

> "The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters pure-

> ly cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken *in limine*, it might have been worthy of attention."

The same statement was made in *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514.

In accord are:

> *Brown* v. *Lake Superior Iron Co.* 134 U. S. 530, 535;
> *Tyler* v. *Savage*, 143 U. S. 79, 97.

In the present case the objection to equity jurisdiction was asserted in the Circuit Court of Appeals in the manner condemned by these decisions. The contention was therefore not available to the appellant, because not founded upon proper pleadings and not apparent on the face of the bill, and hence the Circuit Court of Appeals was entirely right in refusing to consider the question.

It is only upon the theory that this motion challenged the constitutionality of Section 23 that the contention that the section is unconstitutional can be made. The foregoing argument demonstrates that that contention may not be made for lack of appropriate pleading.

CONCLUSION.

It is respectfully submitted that the decree appealed from was right in all respects and should be affirmed with costs.

Respectfully submitted,

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